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**WILLKIE FARR & GALLAGHER** LLP

1875 K Street, NW  
Washington, DC 20006

Tel: 202 303 1000  
Fax: 202 303 2000

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December 1, 2004

Federal Communications Commission  
Office of Secretary

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Room TW-A325  
445 12<sup>th</sup> St. S.W.  
Washington D.C. 20554

**REDACTED--FOR PUBLIC INSPECTION**

Re: Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of  
Local Exchange Carriers, WC Dkt. No. 04-313, CC Dkt. No. 01-338.

Dear Ms. Dortch:

On behalf of Time Warner Telecom, ("TWTC") we have enclosed for filing, pursuant to the protective order in the above referenced proceedings, two copies of the redacted version of a letter and attachments filed today by TWTC in the above referenced dockets. The redacted version of the letter and attachments were also filed electronically today in those dockets.

Confidential versions of the enclosed documents have also been sent to Gary Remondino of the Wireline Competition Bureau and were filed separately with the Secretary.

Please let us know if you have any questions.

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December 1, 2004

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/s/

Thomas Jones  
Jonathan Lechter\*  
Willkie Farr & Gallagher LLP  
1875 K Street, N.W.,  
Washington, D.C. 20006  
(202) 303-1000

\*Admitted in Maryland Only

REDACTED—FOR PUBLIC INSPECTION

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW  
Washington, DC 20006

Tel: 202 303 1000  
Fax: 202 303 2000

December 1, 2004

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Room TW-A325  
445 12th Street, SW  
Washington, DC 20554

Re: CC Docket No. 01-338, WC Docket No. 04-313

Dear Ms. Dortch:

This letter is written on behalf of Time Warner Telecom, Inc. ("TWTC") for the purpose of submitting the attached declaration of Graham Taylor and Charles Boto ("*Taylor-Boto Declaration*" attached as Exhibit A<sup>1</sup>) for inclusion in the above-referenced proceeding. In their declaration, Messrs. Taylor and Boto describe the extent to which TWTC and other competitors have constructed loop facilities to commercial buildings and the methodology TWTC uses to identify buildings to which it might be able to construct loop facilities in the future. The information supplied in the Taylor-Boto Declaration has the following implications for the loop impairment analysis.

*First*, the Taylor-Boto Declaration confirms that competitors are impaired in the absence of unbundled DS1s as well as single DS3s. As Messrs. Taylor and Boto explain, TWTC can only justify the construction of loop facilities to a building where it can earn at least **[proprietary begin]** **[proprietary end]** per year in Tier 1 markets and at least **[proprietary begin]** **[proprietary end]** per year in Tier 2 markets.<sup>2</sup> *See id.* at 5. The record demonstrates that competitors cannot hope to earn this much revenue from even multiple DS1-level customers in a building.<sup>3</sup> As TWTC expands its entry into the small and medium-sized business market, a growing number of its customers purchase services that utilize DS1-level connectivity. Largely because of the relatively limited revenue

<sup>1</sup> Citations provided herein to the *Taylor-Boto Declaration* refer to the non-redacted version of that document.

<sup>2</sup> Taylor and Boto define Tier 1 markets as those urban areas with population in excess of two million people and Tier 2 markets as those urban areas with populations between 500,000 and two million. *See Taylor-Boto Declaration* at 4.

<sup>3</sup> CLECs have explained that they can earn between \$500 and \$700 per month (or between \$6,000 and \$8,400 per year) from a customer that orders a single DS1. *See Nuvox Comments*, WC Dkt. Nos. 04-313 *et al.*, at 3 (filed Oct. 4, 2004); *ex parte* presentation of Cbeyond, WC Dkt. Nos. 04-313 *et al.*, at 3 (filed Sept. 8, 2004). This means that, even in Tier 2 markets, a CLEC would need to win between seven and nine DS1-level customers to come within the range of revenue needed to construct a fiber lateral. This is so unlikely to occur that the Commission need not account for this scenario in an impairment test.

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opportunities associated with services that rely on DS1-level connectivity, TWTC must rely on incumbent LEC loop facilities in 75 percent of its customer locations.<sup>4</sup> Notably, of the customers TWTC serves via ILEC DS1 loop facilities, approximately [proprietary begin] [proprietary end] percent are served by a single DS1 loop. *See Taylor-Boto Declaration* at 3.

It is also clear that, where TWTC must rely on incumbent LEC facilities, other competitors also have not been able to build loop facilities to these locations. For example, Taylor and Boto examined the extent of competitive entry in two Tier 1 markets. Of the [proprietary begin] [proprietary end] commercial buildings in [proprietary begin] [proprietary end], approximately [proprietary begin] [proprietary end] are served by competitive LECs using *either* resold incumbent LEC loops or the competitors' own loop facilities. Only approximately [proprietary begin] [proprietary end] of the commercial buildings in that market [proprietary begin] [proprietary end] are served by two or more carriers using their own fiber loop facilities. Of the [proprietary begin] [proprietary end] commercial buildings in [proprietary begin] [proprietary end], approximately [proprietary begin] [proprietary end] are served by competitors using *either* resold incumbent LEC loops or the competitors' own loop facilities. Only approximately [proprietary begin] [proprietary end] of the commercial buildings [proprietary begin] [proprietary end] in that market are served by two or more carriers using their own fiber loop facilities. *See id.* at 10-11.

TWTC collected this data as part of its effort to identify buildings served by competitive alternatives to incumbent LEC loops. The data demonstrate that competitors serve only a tiny minority of commercial buildings (even with resold incumbent LEC loops) and that (assuming that buildings with more than one fiber loop account for most buildings to which competitors have constructed loops) competitors have constructed loops to an even smaller percentage of commercial buildings. Moreover, the record in this proceeding demonstrates that most of the loops constructed by competitors are for the purpose of serving customer locations with very large telecommunications demand (multiple DS3s).<sup>5</sup> The Taylor-Boto declaration therefore provides further support for the conclusion that competitors are impaired without access to unbundled DS1 and DS3 loops.

Nor is it reasonable to conclude that competitors will be able to construct loops to a significant percentage of buildings in the future. According to Messrs. Taylor and Boto, in the four Tier 1 and four Tier 2 markets studied, the sum of (1) the buildings to which TWTC has already constructed loop facilities and (2) those buildings to which it might theoretically be able to construct loop facilities in

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<sup>4</sup> The 25 percent of locations where TWTC serves customers over its own facilities represents 70 percent of TWTC's revenues. This demonstrates that TWTC generally builds loops only to locations where it can earn extremely high revenues.

<sup>5</sup> *See ex parte* presentation of MiCRA *et al.*, WC Dkt. Nos. 04-313 *et al.*, at 5 (filed Oct. 18, 2004) (citing CLEC filings for the proposition that "KMC will not build laterals unless a customer purchases at least 3 DS3s...XO will not construct laterals unless combined customer demand in a building reaches at least 3 DS3s...Xpedius requires a bare minimum of 3 DS3s in customer demand before constructing laterals...For buildings over 500 feet from its fiber ring, ATI requires that a customer order OC-3 service before building...Echelon and SNIPLink report that it is never economic to self deploy loops to their bases of DS1 service customers.") (internal citations omitted).

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the future<sup>6</sup> amounts to no more than between [proprietary begin] [proprietary end] percent of the total commercial buildings in the market in question. *See Taylor-Boto Declaration at 8.*

*Second*, any impairment test applied to DS3 loops should eliminate incumbent LEC unbundling obligations for such facilities only in those customer locations where multiple competitors already provide DS3-level service over their own loop facilities. In other words, any loop impairment test must be based on actual, not potential, competition. This is because building access problems and customers' refusal to tolerate disruption associated with loop construction vary significantly from one location to another. Such location-specific variations undermine attempts to make generalizations about the level of the relevant entry barriers.<sup>7</sup>

For example, Taylor and Boto estimate that the inability to obtain building access on reasonable terms and conditions causes TWTC to forego loop construction to [proprietary begin] [proprietary end] percent of the buildings that otherwise meet its criteria for loop construction. *See id.* at 9-10. Furthermore, TWTC often does not obtain access to all customers located in buildings for which it has obtained some sort of workable building access. This is true both for buildings for which TWTC has obtained building access without signing a contract with the building owner defining the terms under which it obtains access and for buildings for which TWTC has signed such an agreement. Messrs. Taylor and Boto explain that TWTC has signed access agreements for approximately [proprietary begin] [proprietary end] percent of the buildings to which it has constructed loops. They state that in fully [proprietary begin] [proprietary end] percent of the buildings in which TWTC operates pursuant to a building access contract, TWTC has had to settle for collocation arrangements in the area leased by TWTC's customer rather than establishing a point of presence in a common area in the building. Taylor and Boto estimate that the percentage of collocation arrangements is [proprietary begin] [proprietary end] in buildings for which TWTC has not signed an access contract. *See id.* at 10. TWTC's experience in this regard is by no means anomalous. AT&T estimates that it is restricted to collocation arrangements in [proprietary begin] [proprietary end] of its [proprietary begin] [proprietary end] on-net buildings.<sup>8</sup> To serve other customers in those buildings, AT&T had to purchase ILEC special access [proprietary begin] [proprietary end] of the time. *Id.* Sprint has provided similar evidence in this proceeding.<sup>9</sup>

Collocation arrangements place significant constraints on TWTC's ability to serve other customers within a building. In some cases where it serves a customer via a collocation arrangement,

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<sup>6</sup> Of course, the relevant entry barriers (discussed below) would, in the real world, prevent TWTC from constructing loops to some of the buildings that would otherwise meet TWTC's theoretical revenue threshold for loop construction.

<sup>7</sup> It is also important to point out that the large amount of inefficient construction of fiber loops by the many companies that have been forced into bankruptcy demonstrates that it is unreasonable to rely on past loop construction for predictive judgments regarding efficient loop construction.

<sup>8</sup> *See Declaration of Anthony Fea and Anthony Giovannuci ¶ 44, attached as ex. D to Comments of AT&T Corp., WC Dkt. Nos. 04-313 et al., (filed Oct. 4, 2004).*

<sup>9</sup> *See Reply Comments of Sprint, WC Dkt. No. 04-313 et al., at 29 (filed Oct. 19, 2004) (stating that the "vast majority" of CLEC loops did not have "sufficient reach" within a building to serve as an option for Sprint to serve customers in that building).*

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it is simply impossible for TWTC to serve other customers within the same building. This is the case where the landlord refuses to allow TWTC access to the in-building facilities needed to extend fiber to reach other customers or where the first customer refuses to allow TWTC to use collocated equipment to serve additional customers in the same building. Even under the best of circumstances, collocation arrangements make it more expensive for TWTC to serve additional customers in a building than is the case where TWTC has a point of presence in a common area within a building. Higher costs can only be covered by higher revenues. Accordingly, TWTC can only extend collocated fiber to serve additional customers in the building if such customers offer especially large revenue opportunities. Exactly where additional customers can be served in buildings with collocations must be determined on a building-by-building basis, rendering predictions about where competition is "possible" unreliable at best. It is clear therefore that the Commission should adopt an impairment test for multiple DS3 loops that eliminates unbundling only in those circumstances in which competitors have actually constructed such loop facilities.

*Third*, if the Commission feels compelled to adopt an impairment test for identifying customer locations or buildings to which competitors have not constructed loops but to which they could do so in the future (which it should not), the Commission should at least anchor the analysis in the methodology competitors actually use to identify buildings to which they could potentially construct loops. In their Declaration, Messrs. Taylor and Boto explain that TWTC identifies potential targets for loop construction by comparing the costs of loop construction in a particular building with the potential telecommunications revenues associated with the building as estimated by GeoResults, the same consulting firm that the incumbents have used as the basis for much of the data they have supplied in this proceeding.<sup>10</sup> Messrs. Taylor and Boto estimate that loop construction is economic for buildings that generate [proprietary begin] [proprietary end] per year in revenue in Tier 1 markets and [proprietary begin] [proprietary end] per year in revenue in Tier 2 markets, and they assume that, on average, TWTC could potentially win a maximum of [proprietary begin] [proprietary end] percent of the total telecommunications revenues associated with a particular building. *See Taylor-Boto Declaration* at 5-6. Accordingly, Taylor and Boto conclude that (putting aside the entry barriers associated with building access and other issues that can prevent loop construction) TWTC can potentially build fiber loops to any building with an aggregate potential telecommunications revenue of \$450,000 in Tier 1 markets and \$275,000 in Tier 2 markets. *See id.* at 6.

The Commission could reasonably use these thresholds as the basis for an impairment test for DS3 loops. Under this approach, no competitor would be able to lease more than a single unbundled DS3 loop in any building meeting the relevant aggregate revenue threshold in Tier 1 and 2 cities.<sup>11</sup> This approach is more reasonable than the alternatives for DS3 loop impairment currently under consideration. Those alternatives rely on (1) the number of business access lines in the incumbent LEC wire center in which a building is located, (2) the fact that a competitor has been able to construct a loop to a nearby building or (3) the fact that a competitor has collocated at the incumbent LEC wire

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<sup>10</sup> *See e.g.*, Verizon ex. 1 at 13, attached to Verizon *ex parte* letter, CC Dkt. Nos. 01-338 *et al.*, (filed Jul. 2, 2004) (explaining that Verizon relied upon GeoResults to determine the extent to which CLECs had deployed fiber loops).

<sup>11</sup> As a backstop, the Commission would probably also need to eliminate unbundling of multiple DS3 loops in locations that do not meet the aggregate revenue thresholds discussed herein but in which there have nevertheless been adequate levels of actual entry in the provision of DS3 loops.

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center serving a particular building as the means of identifying buildings to which loop construction is possible in the future. As Taylor and Boto explain, these criteria are simply irrelevant to real-world decisions as to where loop construction is possible:

TWTC does not use these criteria, and we have no basis for thinking that it would be a reasonable business practice to do so. As explained, TWTC assesses the feasibility of loop construction on a building-by-building basis for each building that is located within a reasonable distance ([**proprietary begin**] [**proprietary end**] feet on average) from its transport network. The fact that a particular building is located near (1) other businesses, (2) a building to which TWTC has constructed loop facilities or (3) a TWTC collocation means only that TWTC's transport network may be within a reasonable distance of the building. These factors do not, however, indicate that it is economic for TWTC to construct a loop to the building. Only the revenue opportunities associated with a building indicate that the revenue associated with loop construction could exceed the relevant costs. Any impairment test for potential loop construction should therefore be based on this criterion.

*See id.* at 12-13. Furthermore, at least one incumbent, SBC, has supported this type of methodology for identifying buildings for which competitors are unimpaired for high-capacity loops. In several *Triennial Review Order* state implementation proceedings, SBC argued that loop impairment should be determined based on the aggregate telecommunications revenues in a building as estimated in a study by Cambridge Strategic Management Group.<sup>12</sup> In that context, SBC assumed that a competitor could win 100 percent of the revenues associated with a particular building, an assumption that, as Taylor and Boto explain, is unreasonable. Nevertheless, in all other respects, the SBC proposal is very similar to the one proposed by TWTC. Moreover, while the Cambridge Study reached different conclusions than TWTC regarding the telecommunications revenues needed to justify loop construction in [**proprietary begin**] [**proprietary end**], the Cambridge Study reached strikingly similar conclusions with regard to [**proprietary begin**] [**proprietary end**]. Moreover, the Cambridge Strategic Management Group and TWTC included most of the same cost categories in their analyses.<sup>13</sup> Furthermore, while TWTC has been unable to provide an analysis of Tier 3 markets<sup>14</sup>, Cambridge Strategic Management Group did analyze several such markets. Based on that analysis, the Commission could adopt \$275,000 as the total revenue threshold to determine DS3 loop impairment in Tier 3 cities as well as Tier 2 markets.<sup>15</sup>

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<sup>12</sup> See e.g., attachment RLS-18, appended to direct testimony of Rebecca L. Sparks, SBC Texas, Public Utility Commission of Texas Dkt. No. 28745 (filed Jan. 27, 2004) ("*Cambridge Study*"). A copy of the *Cambridge Study* and the relevant pages from a representative state filing are attached hereto as Exhibit B.

<sup>13</sup> Compare *Cambridge Study* at 3 (asserting that "total costs" include 1) fiber, fiber conduit and installation costs; 2) permitting costs; 3) customer premises electronics; 4) incremental existing network costs; and 5) "billing expense," "bad debt expense" and "LD Operating Costs") with Taylor-Boto Declaration at 3-4 (discussing how costs include 1) the cost of fiber installation; 2) ongoing and one-time license fees and franchises; 3) initial and ongoing costs of CPE; 4) costs of incremental additions to network facilities; and 5) ongoing expenses associated with LD operations, billing and bad debt.).

<sup>14</sup> Tier 3 markets are defined by TWTC as having a population of between 50,000 and 499,000.

<sup>15</sup> [**Proprietary begin**] [**Proprietary end**] TWTC rounded that number up to \$275,000 for simplicity.

Ms. Marlene H. Dortch  
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Finally, it is important to point out that the test proposed herein would be simple to administer. The GeoResults data regarding aggregate telecommunications revenue per building are widely used in the industry, and are available for all the markets that should be relevant to the impairment analysis. A periodic review of the data (which are updated regularly) would identify buildings for which multiple DS3s are available, thus making administration of the test straightforward.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), one electronic copy of this notice is being filed in each of the above-referenced proceedings.

Sincerely,

/s/

Thomas Jones

cc: Tom Navin  
Jeremy Miller  
Cathy Zima  
Russ Hanser  
Tim Stelzig  
Carol Simpson  
Gail Cohen  
Ian Dillner  
Chris Cantor  
Chris Killion



## **Exhibit A**

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**BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.**

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	

**DECLARATION OF GRAHAM TAYLOR AND CHARLES M. BOTO ON  
BEHALF OF TIME WARNER TELECOM, INC.**

I am Graham Taylor, Senior Vice President for Marketing at Time Warner Telecom ("TWTC"). I have over 25 years of telecommunications industry experience in marketing, sales, corporate development, management and operations. I spent 13 years specifically in the local network services competitive environment with TCG, AT&T Local, LOGIX and TWTC. I was responsible for the build out of many of TCG's networks and markets.

I am Charles M.. Boto, President of the Real Estate Group at TWTC. I have been with TWTC since 1998 and am responsible for all real estate and building access issues in all TWTC markets. I have completed well over 2,800 building access transactions for the company. From 1994 to 1998, I was the National Director, Real Estate for Metropolitan Fiber Systems (now MCI) and my responsibilities included negotiating over 2,000 access agreements for entry into commercial office buildings in over 65 cities across the country. Prior to joining MFS, I held a senior position with Corporate Real Estate Advisors in Washington, D.C., providing real estate services to corporate clients. I have over 25 years experience in all facets of the real estate industry, including real estate brokerage, development and construction.

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The purpose of this declaration is to (1) describe TWTC's business and network generally; (2) describe the analysis TWTC undertakes to determine whether it is possible to construct fiber loop facilities to serve a particular end user location and describe a model for identifying buildings in particular markets that would theoretically meet TWTC's criteria for loop construction; (3) describe the real-world impediments TWTC faces in deploying loop facilities to buildings that would otherwise meet its criteria for loop construction, and the extent to which those impediments have actually limited TWTC's ability to serve all of the customers in a building or prevented TWTC from constructing loop facilities altogether to a building; (4) describe the extent to which other CLECs have constructed loop facilities connecting buildings to which TWTC has not constructed loop facilities; and (5) discuss the appropriate impairment standard for high-capacity loops.

### **1. TWTC's Business And Network**

TWTC was established in 1993. It is a leading provider of local and regional optical networks and broadband services to business customers in 22 states and 44 metropolitan areas around the country. TWTC is collocated in more than 300 ILEC central offices around the country and has installed 52 switches. TWTC has invested nearly \$2.3 billion in its network and has deployed over 19,000 route miles of fiber, of which over 12,000 route miles have been deployed in local metro networks.

It is in TWTC's interest to build its own facilities whenever possible. When TWTC provides service over its own facilities, it is able to control the service end-to-end and provide a more reliable customer experience. TWTC also possesses greater flexibility to design innovative new offerings when providing service over its own facilities, because, in such cases, it is not constrained by another carrier's choice of technology or network design.

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Unfortunately, there are many locations where TWTC is unable to achieve the revenue and return on investment required to deploy its own loop facilities. Overall, only approximately 25 percent of the customer locations served by TWTC are served entirely by TWTC's own loops. Where TWTC has not built its own loops, it must rely on incumbent ILEC loops. Of the customer locations for which TWTC must rely on ILEC loops, **[proprietary begin]** **[proprietary end]** percent are served by ILEC DS1 facilities and **[proprietary begin]** **[proprietary end]** percent are served by ILEC DS3 facilities. Of the customers TWTC serves via ILEC DS1 loop facilities, approximately **[proprietary begin]** **[proprietary end]** percent are served by a single DS1 loop, **[proprietary begin]** **[proprietary end]** percent by two DS1 loops, **[proprietary begin]** **[proprietary end]** percent by three DS1 loops, **[proprietary begin]** **[proprietary end]** percent by four DS1 loops, and **[proprietary begin]** **[proprietary end]** are served by five or more DS1 loops.

### **2. Build-Lease Analysis**

In the geographic markets in which it operates, TWTC generally deploys fiber SONET ring transport facilities. TWTC constructs such facilities in the parts of downtown metropolitan areas and office parks in which the largest business customers are concentrated.

TWTC's SONET rings are built into some especially large commercial buildings as part of the original construction of those buildings. But in most cases, TWTC must construct a stand-alone fiber lateral (*i.e.*, loop) facility to a building in which it seeks to serve a particular business customer on its own network. TWTC considers a range of different factors when determining whether it is cost-effective to construct fiber loop facilities to a particular end user customer. For example, TWTC considers the proximity of a customer to a splice point on TWTC's SONET ring. This is because loop construction is distance-sensitive, and the further a customer location is from a splice point on TWTC's network, the more expensive the loop facility is likely to be.

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TWTC also considers the revenue it can earn by serving customers in a particular building. It is important to emphasize that, even when the revenue associated with a building is significant enough to justify loop construction, problems caused by issues such as the need to obtain building access and access to rights-of-way (discussed in the following section) can prevent TWTC from constructing loop facilities. Absent such problems, however, and assuming that a business customer is within an average of [proprietary begin] [proprietary end] of a splice point on TWTC's network, constructing loop facilities and deploying electronics needed to "light" a building costs TWTC, on average, approximately [proprietary begin] [proprietary end] per building in Tier 1 markets and [proprietary begin] [proprietary end] in Tier 2 markets. Specifically, these average totals are the sum of costs associated with (1) fiber installation (including the cost of the fiber itself, the cost of installing fiber, and the cost of access to conduit and construction of conduit where necessary); (2) costs associated with one-time and ongoing licenses, fees and franchises; (3) the initial and ongoing costs of customer premises equipment (including the equipment itself, labor costs and initial building entrance fees); (4) the cost of incremental additions to existing network facilities (including a splice box on the TWTC SONET ring and ATM or ADM ports that must added); and (5) other ongoing expenses such as costs associated with long distance operations, billing and bad debt. TWTC defines Tier 1 markets as those urban areas with populations in excess of two million people and Tier 2 markets as those urban areas with populations between 500,000 and two million. The average cost of lighting a building is higher in Tier 1 markets than in Tier 2 markets because larger markets have a greater concentration of streets and buildings, which makes trenching and street repair more costly and time-consuming.

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To justify loop construction, TWTC must be able to earn sufficient revenue from end user customers to both cover its construction costs, ongoing expenses and achieve a reasonable rate of return. Of course, the number of customers needed to recover the costs of loop construction depends on the aggregate volume of service demanded by the customers in question. Moreover, TWTC incurs different costs to provide different types of service and customers' willingness to commit to longer-term contracts varies (smaller and medium-sized business customers typically commit to two-year agreements and larger customers are more likely to commit to three-year agreements). Variations such as these affect the build-lease analysis. Nevertheless, TWTC has found that, as a general matter, it can justify construction of loop facilities for a building that generates on average (1) approximately **[proprietary begin]** **[proprietary end]** per year in revenue from multi-year customer contracts in Tier 1 markets, and (2) approximately **[proprietary begin]** **[proprietary end]** per year in revenue from multi-year customer contracts in Tier 2 markets.

In light of these revenue targets, TWTC conducted a study to determine the number of buildings to which it would be possible to construct loop facilities in four of TWTC's Tier 1 markets **[proprietary begin]** **[proprietary end]** and four of TWTC's Tier 2 markets **[proprietary begin]** **[proprietary end]**. As part of its analysis, TWTC assumed that it could potentially win on average **[proprietary begin]** **[proprietary end]** percent of the revenue associated with a particular commercial building. This is a reasonable average outer limit assumption for a building because many commercial customers have made long-term service commitments to the incumbents that essentially prevent TWTC from competing for such customers for the foreseeable future. Moreover, no competitor can expect to win all, or even a majority, of the customers from a powerful entrenched incumbent with strong brand-name

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recognition and established customer relationships. Furthermore, TWTC usually wins less than [proprietary begin] [proprietary end] percent of the revenues associated with multi-tenant buildings but often wins more than [proprietary begin] [proprietary end] percent of the revenues associated with owner occupied buildings. The [proprietary begin] [proprietary end] percent estimate represents an average of these two contexts since TWTC serves customers in both multi-tenant and owner occupied buildings.

Given that TWTC assumes that it can win on average a maximum of [proprietary begin] [proprietary end] percent of the telecommunications service revenues associated with a particular building and that TWTC must earn [proprietary begin] [proprietary end] per year in Tier 1 markets and [proprietary begin] [proprietary end] per year in Tier 2 markets to make loop construction profitable, it follows that TWTC could only potentially construct fiber loops to those buildings with a total of (1) 450,000 in Tier 1 markets and (2) 275,000 in Tier 2 markets per year in telecommunications revenue.

In order to identify the buildings that meet these telecommunications revenue thresholds, TWTC used data regarding revenue potential for commercial buildings provided by GeoResults. GeoResults estimates telecommunications revenues in each commercial building in large urban markets across the country. To estimate telecommunications revenues, GeoResults studies the size and type as well as other profiling characteristics of businesses in a particular building and estimates normal bandwidth needs for such businesses. GeoResults then assigns an average dollar amount to the volume and type of telecommunications services likely to be demanded by the businesses in a building to produce a total telecommunications spend amount for a particular commercial building. Using the GeoResults data, TWTC found that, of the buildings to which TWTC has not constructed fiber loop facilities, the number of buildings that meet the minimum

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[illegible]

**[proprietary end]**

Furthermore, the potential fiber construction analysis described herein is subject to the critical qualification that TWTC cannot construct loops to any building unless and until customers within a particular building have actually committed to purchasing services with adequate revenue to meet TWTC's criteria for loop construction. Without careful focus on ensuring that it can recover the costs of loop construction on a building-by-building basis,



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TWTC cannot be assured that it will have the financial stability to remain a competitive alternative to the ILECs and to grow. This explains why, even in markets like the eight discussed herein where TWTC has self-deployed its own transport network, there remains a very large segment of customers within buildings that, in theory, meet TWTC's criteria for loop construction to which TWTC cannot yet afford to construct loop facilities.

### **3. Impediments That Prevent TWTC From Constructing Loop Facilities Where Construction Would Otherwise Be Justified Under TWTC's Build/Buy Analysis.**

Even if the business case based on committed customer revenues and proximity to TWTC's network justifies self-deployment, there are three types of entry barriers that can prevent construction completely or delay construction to such an extent that customers are unable or unwilling to wait for the service and have no choice but to purchase service from the ILEC, or from a CLEC that relies on ILEC transmission facilities.

First, TWTC must secure access to rights-of-way ("ROW") from the municipality for the path from TWTC's existing network to the building it wishes to serve. Access to ROW is sometimes denied altogether because of municipal access moratoria or because there is no room in ducts and conduits running along public ROW. Municipalities also sometimes require that carriers wait and coordinate street digging, thereby causing additional delays. Other communities mandate that part of TWTC's network actually be assigned for use by the municipality as a condition of doing business. Municipalities also often impose significant charges for obtaining access to public ROW.

Second, TWTC must obtain access to buildings on reasonable terms and conditions. Sometimes landlords refuse to permit TWTC to obtain access under any terms and conditions to serve customers within their buildings. Other times, landlords require that TWTC pay unreasonable fees. TWTC does not keep detailed records of the number of buildings that qualify

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for loop construction based on committed revenues where such construction is rendered impossible because of problems associated with obtaining building access. Nevertheless, based on our experience, we estimate that between [proprietary begin] [proprietary end] percent of the buildings to which TWTC would construct fiber loops are deemed ineligible for fiber builds because of building access problems. Moreover, many building owners only grant TWTC access to a single customer within a building. TWTC has had to accept such “collocation” arrangements in [proprietary begin] [proprietary end] percent of the buildings in which it has signed building access contracts with the building owner. Overall, TWTC has signed building access contracts with the building owners in approximately [proprietary begin] [proprietary end] percent of the buildings to which it has constructed fiber loops. TWTC does not keep detailed records regarding the percent of buildings for which it has not signed building access agreement with the building owner in which TWTC has had to accept a collocation arrangement. Based on our experience, we estimate that [proprietary begin] [proprietary end] of such buildings have collocation arrangements than is the case with the buildings for which TWTC has signed building access contracts.

Third, many end user customers will not tolerate the delay and disruption associated with constructing new loop facilities. Many customers decide they are unwilling to wait for even the normal delay associated with loop construction. Many others decide they will not tolerate extra delays that arise due to unforeseen circumstances. TWTC does not keep detailed records regarding customers that refuse service over TWTC loop facilities because of delays associated with loop construction, and it is unfortunately not possible to estimate the percentage of buildings in which this factor has prevented loop construction.

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### 4. The Extent To Which Other Competitors Have Constructed Loop Facilities Serving Commercial Buildings.

In those locations in which TWTC has not been able to construct its own transmission facilities, it must rely on other carriers' facilities to serve end user customers. For example, using GeoResults data, we conclude that, of the [proprietary begin] [proprietary end] commercial buildings in [proprietary begin] [proprietary end] are served by CLECs using *either* resold incumbent LEC loops or the competitors' own loop facilities. In addition, again using GeoResults data, we conclude that [proprietary begin] [proprietary end] of the commercial buildings in [proprietary begin] [proprietary end] are served by two or more carriers using their own fiber loop facilities. In [proprietary begin] [proprietary end] using GeoResults data, we conclude that, of the [proprietary begin] [proprietary end] commercial buildings, [proprietary begin] [proprietary end] are served by CLECs using *either* resold incumbent LEC loops or the competitors' own loop facilities. In addition, using GeoResults data, we conclude that [proprietary begin] [proprietary end] of the commercial buildings in [proprietary begin] [proprietary end] are served by two or more carriers using their own fiber loop facilities.

### 5. Impairment Standard

We understand that the FCC is considering adopting a standard for determining the circumstances in which competition is "possible" (*i.e.*, where competitors are "impaired") without access to unbundled incumbent LEC DS1 and DS3 loops. As mentioned, TWTC cannot justify constructing loop facilities unless customers in a particular building have actually committed to the minimum revenue thresholds needed to make loop construction economic. Accordingly, the Commission could only reliably conclude that competition is possible in those customer locations where competitors such as TWTC have actually constructed loops and are

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offering service at the relevant capacity level. The entry barriers we describe above vary enough from one location to another and from one moment in time to another that predictions as to which customer locations TWTC can construct loops in the future are likely to be unreliable.

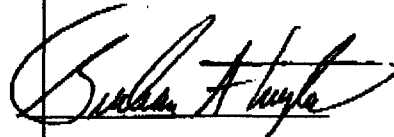
It is important to point out, however, that the entry barriers to fiber loop construction are generally quite similar regardless of the capacity of the service offered over the fiber and that, generally speaking, the higher the capacity of service TWTC sells to a customer, the greater the revenue it earns. Some of the relevant entry barriers (such as higher building access costs) that would make loop construction uneconomic at lower levels of connectivity can in some cases be overcome where a customer demands a higher level of connectivity and thus offers TWTC greater revenue opportunities. Accordingly, while any effort to identify buildings to which competitors could build fiber loops in the future is likely to be fraught with inaccuracy, the FCC could reduce the inaccuracy of an "impairment" test that eliminates incumbent LEC unbundling obligations at customer locations not currently served by competitors' fiber if such a test applied only to loops of higher levels of connectivity.

Any such test must, however, be based on the criteria that competitors such as TWTC actually use to identify buildings as potential targets for loop construction. We understand that it has been suggested that the FCC could rely on (1) the number of business access lines in the incumbent LEC wire center in which a building is located, (2) the fact that a competitor has been able to construct a loop to a nearby building or (3) the fact that a competitor has collocated at the incumbent LEC wire center serving a particular building as a means of identifying buildings to which loop construction is possible in the future. TWTC does not use these criteria, and we have no basis for thinking that it would be a reasonable business practice to do so. As explained, TWTC assesses the feasibility of loop construction on a building-by-building basis for each

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building that is located within a reasonable distance [proprietary begin] [proprietary end] from its transport network. The fact that a particular building is located near (1) other businesses, (2) a building to which TWTC has constructed loop facilities or (3) a TWTC collocation means only that TWTC's transport network may be within a reasonable distance of the building. These factors do not, however, indicate that it is economic for TWTC to construct a loop to the building. Only the revenue opportunities associated with a building indicate that the revenue associated with loop construction could exceed the relevant costs. Any impairment test for potential construction of loops that deliver very high levels of connectivity should therefore be based on this criterion.

I declare under penalty of perjury that the forgoing is true and correct.



Graham Taylor

Executed on 11-30-04

**REDACTED—FOR PUBLIC INSPECTION**

I declare under penalty of perjury that the forgoing is true and correct.

A handwritten signature in black ink, appearing to read 'Charles M. Boto', written over a horizontal line.

Charles M. Boto

Executed on 11/30/04